A

PP

v.

AHMAD ABDUL RASHID

B

HIGH COURT MALAYA, ALOR SETAR
MOHD ZAKI WAHAB JC
[CRIMINAL APPEAL NO: 42S-97-10-2011]
10 NOVEMBER 2012

C ***CRIMINAL LAW:*** *Penal Code - Section 199 - Making of false statement in statutory declaration - Ingredients of offence - Whether making of declaration proven - Whether receivable as evidence - Whether r. 13, Commissioner for Oaths Rules 1993 contravened - Whether prima facie case established - Statutory Declarations Act 1960*

D ***EVIDENCE:*** *Statutory declaration as evidence - False declaration - Penal Code, s. 199 - Requirements of - Whether satisfied - Whether proven to be declaration under Statutory Declarations Act 1960 - Whether receivable as evidence - Whether r. 13 Commissioner for Oaths Rules 1993 contravened - Whether prima facie case established*

E

The accused was charged in the Sessions Court for an offence under s. 199 of the Penal Code. In brief, the accused, an advocate and solicitor, was engaged for the purpose of preparing and executing certain documents in a transaction which involved
F the estate of one Haji Muhammad ('the estate'). One Abdul Hamid ('the deceased'), SP2 and SP3 were appointed as joint administrator of the estate. Amongst the engagements, the accused was required to prepare a power of attorney ('the PA'). It was later discovered that some pieces of the landed properties, which
G were the subject matter of the estate, were sold to a third party, the transactions of which were carried out using the PA and were mainly done by the deceased. This led to a dispute between the deceased, SP2 and SP3 who were unhappy with the transactions. SP2 then lodged a police report against the accused in relation to
H the PA, which was said to be prepared by the accused and also signed before him. However, SP2 denied signing the PA. Prior to that, the accused was also said to have signed a statutory declaration ('D15') before the commissioner for oaths ('SP4'), wherein the accused stated that the PA was signed before him by
I all the parties, including SP2 and SP3. At the end of the

prosecution's case, the learned Sessions Court Judge held that the prosecution had failed to make out a *prima facie* case and as such, the accused was acquitted and discharged. Hence, the prosecution's appeal.

Held (dismissing appeal):

(1) Being the most important ingredient of the charge under s. 199 of the Penal Code, the prosecution had a duty to prove that D15 was signed by the accused. In his evidence, SP4 clearly said that D15 was never signed by the accused before him. However, during the trial, SP4 was never asked to confirm the signature of the accused made in D15. Likewise, pertinent questions were not put to the material witness to obtain confirmation of the signature of the accused allegedly appearing in D15. In this regard, the prosecution had failed to avail itself of s. 47 of the Evidence Act 1950 to prove the signature of the accused in D15. Hence, the evidence produced by the prosecution did not prove that D15 was signed by the accused. (paras 10, 12, 15 & 16)

(2) The law relating to the making of a statutory declaration is governed by the Statutory Declarations Act 1960 ('the Act'). A commissioner for oaths appointed under s. 11 of the Courts of Judicature Act 1964 is authorised to take and receive a statutory declaration by virtue of s. 2 of the Act. On the facts, D15 was not proved to have been signed (if it was at all signed) by the accused before SP4. (paras 18-20)

(3) The requirements under r. 13 of the Commissioner for Oaths Rules 1993 ('Rules') are mandatory in order to ensure that a statutory declaration was made personally and voluntarily by a declarant. The law mandatorily requires a person making a declaration under the Act to be present before a commissioner for oaths. On the facts, D15 was made in contravention of r. 13(2)(a), (b) and (d) of the Rules. Further, a statutory declaration which was not signed before a commissioner for oaths is not a declaration under the Act and therefore, is not a declaration receivable as evidence as envisaged by s. 199 of the Penal Code. As such, the prosecution had failed to prove that the declaration was receivable as evidence. (paras 21-23)

(4) It is trite law that the prosecution has the duty to prove all the ingredients of a charge before it could be said that a *prima facie* case had been made out. In this case, the prosecution had failed to prove the two very important ingredients of the charge, *ie*, the making of the declaration by the accused and the declaration was a declaration receivable as evidence. Hence, the prosecution had failed to make out a *prima facie* case against the accused and the decision of the learned Sessions Court Judge was free from error. (paras 26 & 27)

Case(s) referred to:
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 11(1)
Commissioner for Oaths Rules 1993, r. 13(2)(a), (b), (d)
Evidence Act 1950, ss. 47, 167
Penal Code, s. 199
Statutory Declarations Act 1960, s. 2

For the appellant - Nazrul Nizam Mohd Zamri; DPP
For the respondent - N Rajivan; M/s Sitham & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zaki Wahab JC:

The Charge

[1] The respondent here (the accused in the court below) was charged in the Sessions Court with an offence under s. 199 Penal Code. The charge was as follow:

> Bahawa kamu pada 11 Jun 2008, di bilik 4, Tingkat Atas, 21, Jalan Ibrahim, di Daerah Sungai Petani, dalam Negeri Kedah Darul Aman, telah mengikrarkan satu akuan berkanun (seperti dilampiran A) yang kamu ketahui atau percaya adalah palsu atau percaya sebagai benar tentang mana-mana perkara mustahak iaitu pemberikuasa Power of Attorney bertarikh 12 Januari 1994 hadir didepan kamu semasa ia ditandatangani, dan dengan itu kamu telah melakukan kesalahan di bawah s. 199 Kanun Keseksaan yang oleh dihukum dibawah s. 193 Kanun Keseksaan.

[2] At the end of the prosecution's case, the learned Sessions Judge held the prosecution had failed to make out a *prima facie* case against the accused. Accordingly, the accused was acquitted and discharged. Dissatisfied with the order the Public Prosecutor now appeals before me.

The Facts

[3] The respondent at the material time is an advocate and solicitor. He was engaged by one Abdul Hamid Mohamad (who has since deceased), his sisters Dato Dr Norraesah Mohamad (SP2) and Datin Kamariah binti Haji Muhammad (SP3) for the purpose of preparing and executing certain documents in a transaction involving the estate of one Haji Muhammad ("the estate"). The deceased, SP2 and SP3 were appointed as joint administrator of the estate in early 1990's. The estate comprise mainly landed properties. Amongst the engagements, the accused was required to prepare power of attorney (PA).

[4] It was later discovered that some pieces of the landed properties, which were the subject matter of the estate, were sold to third party. These transactions were carried out using the power of attorney and were mainly done by the deceased. This led to a dispute between the deceased and his two sisters, SP2 and SP3 who were obviously unhappy with the transactions. SP2 then lodged a caveat on the properties involved conceivably to restraint further dealing on the properties.

[5] On 28 October 2008, SP2 lodged a police report against the accused. The gist of her report was in relation to the power of attorney (P3) ("the PA"), which was said to be prepared by the accused and also signed before the accused. P3 was said to have been signed by SP2 and SP3 when in fact SP2 and SP3 only gave an authority to the deceased to deal with the land. SP2 categorically denied of having signed the PA.

[6] Prior to the lodging of the police report, the accused was said to have signed a statutory declaration where the accused had stated in the statutory declaration that the PA was signed before him by all the parties, including SP2 and SP3. The statutory declaration is the subject matter of the charge against the respondent.

A **The Ingredients Of The Charge**

[7] It is appropriate at this juncture to pause for a moment and consider the constituent ingredients of the offence charged. It is instructive to refer to s. 199 Penal Code which reads:

B

> Section 199. False statement made in any declaration which is by law receivable as evidence.
>
> Whoever, in any declaration made or subscribed by him, which declaration any Court, or any public servant or other person, is
C bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

D

[8] In my judgment, it is clear that under s. 199 Penal Code, the prosecution must to prove the following ingredients namely:

(a) The accused had made a declaration;

E (b) The declaration that the accused made is receivable as an evidence;

(c) The declaration contained false statement, which, either the accused knew or believe to be false; or the accused does not
F believe it to be true;

(d) The false statement touching or connecting with the object of the making of the declaration.

[9] The first ingredient is the making of the declaration by the
G accused. In the present case the purported declaration was referred to as "lampiran A" in the charge. The said "lampiran A" was said to be made before one Ishak bin Yaakub, a Commissioner for Oaths (SP4). This document was first introduced through SP4 and was marked as IDD15 during his
H examination in chief. It was later tendered through the investigation officer, ASP Mohd Alias bin Bachok (SP8) and marked as D15. The use of alphabet "D" in the marking of the exhibit is apparent indication the exhibit as the defence exhibit.

I

In my view this document was improperly marked as defence exhibit (D15) even though it was tendered by the prosecution through their own witness. In my view, the statutory declaration should have been marked as the prosecution's exhibit, P15. Nevertheless, improper marking of an exhibit did not nullify the trial as clearly provided under s. 167 Evidence Act 1950 which read:

> Section 167. No new trial for improper admission or rejection of evidence.
>
> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[10] Now coming back to the facts at hand. In D15 the accused was said to have affirmed a declaration that a power of attorney was signed before him by SP2 and SP3 as donors of power to their brother Abdul Hamid bin Mohamad (the deceased) as donee, to do and carry out any dealing on pieces of land that they were the joint administrators.

Thus in my judgment it becomes the paramount duty of the prosecution to prove that the accused was the one who made the declaration, as proving of the making of the declaration is the most essential element of the charge.

[11] The prosecution would be able to prove the making of D15 by the accused by proving that the accused had signed the declaration. D15 contained two signatures; one by SP4, and the other said to be the accused's signature. SP4's signature was sufficiently proved. Then, what remains to be proved is the execution of the document by the accused. In other words the prosecution must prove that in fact the accused signed the declaration.

[12] In his evidence SP4 said clearly that D15 was never signed by the accused before him. According to SP4, when D15 was brought to him, the declarant, whoever it was, had already put his signature. SP4 said he could not remember the accused, which

A was said to be the person who made the declaration, came and executed the document in his presence. SP4 admitted that the usual practice was the accused will not sign all the documents in his presence. It is important at this stage to note that during the trial SP4 was never asked to confirm the other signature was the
B accused's signature.

[13] The prosecution then called SP5, Nor Shuhada bt Abdullah. She has previously worked as a clerk in Tetuan Ahmad & Co, a firm of solicitors where the accused practiced as an advocate and
C solicitor. She was asked to confirm signature appearing in the PA (P3), was that of the accused's signature. She confirmed it was the respondent's signature. However, it is pertinent to note that she was never shown with D15 to confirm the signature of that document was the signature of the accused.

D **[14]** SP6, who had worked with the respondent was next called, but only to identify the accused's signature in P3. SP6 was also never shown with D15 for her to identify and confirm the signature in that document to be the signature of the accused. The prosecution had also called the Mr Mohd Tauronazmi bin
E Ismail (SP1) said to be expert document examiner. SP1 had examined the PA document and express his expert view on that document only. However SP1 was was never asked to examine D15.

F **[15]** I have observed earlier that pertinent questions were not put to the material witness to obtain confirmation of the accused signatures allegedly appearing in D15. In this regard the prosecution in my view had failed to avail itself of s. 47 Evidence Act 1950 to prove the accused's signature in D15. Section 47
G Evidence Act 1950 provides:

> Section 47. Opinion as to handwriting when relevant
>
> When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any
H person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact.
>
> Explanation - A person is said to be acquainted with the handwriting of another person when he has seen that person
I write, or when he has received documents purporting to be written by that person in answer to documents written by himself

or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

ILLUSTRATIONS

The question is whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Kuala Lumpur, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

[16] I found that the evidence produced by the prosecution did not prove that D15 was signed by the accused. As I had said at the earlier part of this judgment, it is the duty of the prosecution to prove that D15 is a statutory declaration signed by the accused and that this is the most important ingredient of the charge under s. 199 Penal Code. The prosecution in the present case had failed to prove the most important ingredient of the charge. It follows, the prosecution case therefore fails.

[17] However and for completeness I will now proceed to make a finding on the other ingredient of the charge in the event my finding on the first ingredient of the charge is wrong. The second ingredient is that the said declaration must be receivable as evidence.

[18] The law relating to the making of a statutory declaration is governed by the Statutory Declarations Act 1960. Section 2 of the Act provides for such a declaration to be made before a certain group of persons. Section 2 of the Statutory Declarations Act 1960 provides:

Section 2. Form of declaration.

It shall be lawful for any Sessions Court Judge, Magistrate, or Commissioner for Oaths or, subject to section 4 of the Notaries Public Act 1959 [Act 115], any notary public appointed under the Notaries Public Act 1959, to take and receive the declaration of any person voluntarily making the same in Malay or English in the form in the Schedule.

[19] A Commissioner for Oaths, appointed under s. 11 of the Courts of Judicature Act 1964 (Revised - 1972) is authorised to take and receive a statutory declaration by virtue of s. 2 of the Act. In performing his duty, a Commissioner for Oaths is subjected to certain rules prescribed by the Chief Justice under s. 11(1) of the Courts of Judicature Act 1964. The Chief Justice had duly prescribed the duties of a Commissioner for Oaths in performing his duty, under the the Commissioner for Oaths Rules 1993 (PU(A) 71/93). Rule 13 of the Commissioner for Oaths Rules 1993 make provision for the conduct and duties of Commissioner for Oaths as follows:

Rule 13. Conduct and duties of Commissioner for Oaths

(1) In the course of performing his duties, a Commissioner for oaths shall pin at the top left shirt pocket an identification tag described in Form 5.

(2) In exercising his functions, a Commissioner for Oaths shall personally attend to any person requiring his services and shall:

(a) verify the identity, the personal particulars as given in the identity card or passport, and the address of the person making the declaration, affirmation, affidavit, oath, or statement before the Commissioner;

(b) read over and explain the contents of the documents and the exhibits attached thereto to the deponent or maker of the document, if the deponent or maker of the document is blind, illiterate or does not understand the language written in the document, before certifying that he has done so in the *jurat*;

(c) initial any alteration made in the document to be sworn or affirmed;

(d) not affix his seal to any document unless the deponent or maker of the document signs or affixes his thumbprint thereto before him;

(e) refuse the services of his office when the Commissioner has cause to suspect that any person before him is engaging in deception, fraud, duress, or any other illegal conduct;

(f) carry out the functions of his office in a prompt, reasonable and business-like manner; and

(g) make himself available to conduct all functions of his office at regular and reasonable hours.

[20] In the present case D15 was not proved to have been signed, (if it is at all signed) by the accused before SP4, the Commissioner for Oaths. What is then the position for a statutory declaration not signed before a Commissioner for Oath? Was it a valid statutory declaration?

[21] In my view the law requires a declaration made under the Statutory Declarations Act 1960 to be made in compliance of statutory requirements, provided under the Statutory Declarations Act 1960 and under any relevant provisions of a written law. In this case D15 was made before a Commissioner for Oaths and the making of the D15 must be subjected to rules governing the duty of the Commissioner for Oaths. Clearly here, D15 was made in contravention to r. 13(2)(a),(b) and (d) of the Commissioner for Oaths Rules 1993.

[22] In my view the requirements under the above r. 13 are mandatory requirements, in order to ensure that a statutory declaration was made personally and voluntarily by a declarant. To this end, the declarant must be personally present and execute the declaration (either by signing or affixing his/her thumb print) before the Commissioner for Oaths. Support for my view can be obtained from a clear reading of r. 13(2)(a) that requires the Commissioner for Oaths to verify the identity, the personal particulars as given in the identity card or passport, and the address of the person making the declaration, affirmation, affidavit, oath, or statement before the Commissioner. Voluntariness of making the declaration is also very important aspect as it was clearly provided under s. 2 of the Act. This can only be ascertained with the physical presence of the declarant! For all these reasons, the law mandatorily requires a person making a declaration under the Statutory Declarations Act 1960 to be present before a Commissioner for Oaths.

[23] On the circumstances in this case I hold that a statutory declaration which was not signed before a Commissioner for Oaths is not a declaration under the Statutory Declarations Act 1960 and therefore is not a declaration receivable as evidence as

envisaged by s. 199 Penal Codes. As such I found that the prosecution had failed to prove the second ingredient of the charge.

[24] The third and fourth ingredients are related the falsity of the statement contained in the declaration and the knowledge of the declarant as to the falsity of the statement. The false statement also must touch on the very purpose of the making of the declaration.

[25] D15 was said to be made by the accused to declare that the PA (P3) was signed by SP2 and SP3 before the respondent as the donor of the PA to the deceased. On my scrutiny of the record, I am of the opinion that the evidence of SP2 and SP3 is credible and should be accepted and believed to prove that P3 was never signed by SP2 and SP3 before the accused. If the prosecution had succeeded in proving the first element of the charge that I had alluded to earlier, namely the accused had signed D15, the accused must have the knowledge that the statement he made in D15 is a false statement. I therefore hold that the third and fourth ingredients of the charge had been proved by the prosecution.

[26] It is trite law that the prosecution has the duty to prove all the ingredients of a charge before it can be said that a *prima facie* case has been made out - (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393). It is also a cardinal principle of criminal law that it is never a duty of the defence to disprove a charge at any stage of a trial - (see the case of *Tan Foo Su v. PP* [1967] 1 LNS 179; [1967] 2 MLJ 19). In this case the prosecution had failed to prove two very important ingredients of the charge, ie, the making of the declaration by the accused and the declaration is a declaration receivable as evidence. Consequently the prosecution had failed to make out a *prima facie* case against the accused.

[27] Upon the scrutiny of the records before me I found that the decision of the learned Sessions Judge free from error.

[28] For the reasons appearing above I dismissed the appeal by the prosecution.